

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 56247/2013
DATE: 9/9/2016
REPORTABLE
OF INTEREST TO OTHER

JUDGES

In the matter between:

LINDIWE LILLIAN **MNISI**

First Applicant

LINDIWE LILLIAN **MNISI N.O.**

Second Applicant

and

SELINAH MAHLARE N.O.

MOTALANE **KGARIYA**
INCORPORATED

SELINAH MAHLARE

REGISTRAR OF DEEDS, PRETORIA

MASTER OF THE HIGH COURT

SHERIFF OF COURT, ODI

First RespondentSecond

Respondent Third Respondent

Fourth RespondentFifth

Respondent Sixth Respondent

J U D G M E N T

MALIJ:

[1] The first applicant in her personal capacity and the second applicant in her capacity as executrix of the estate of the late Mangata Sarah Kekana seeks a rescission of judgment. The rescission is sought in terms of Rule 42(1)(a) of the Uniform Rules of Court. The applicants also ask for the bar to file their plea be uplifted and that they be granted condonation to file their plea.

[2] The judgment was granted against the applicants in favour of the first and second respondents on 15 April 2014. The applicants brought this application for rescission and the removal of the bar on 2 March 2015.

[3] It is common cause that the default judgment was handed down in the presence of the applicants' attorneys. The reason for the said default judgment is that the applicants failed to deliver their plea and they were barred from filing their plea on or about 27 January 2014.

[4] The judgment sought to be rescinded reads as follows:

"1. *THAT the Will of the testator dated 16 august 2010 be declared null and void;*

2. *THAT it be declared that the testator died intestate;*

3. *THAT the second plaintiff be declared the sole heir;*

4. *THAT the transfer of the property under Title deed [T46.../2013] in terms of Section 6 of the Deed Registries Act 47 of 1937 be set aside and that the property be returned to the deceased's estate and Title Deed [T1.../1999] be revived;*
5. *THAT the second defendant within ten after requested by the transferring attorney to do so, sign all necessary and relevant documentation, in order for the transferring attorney to transfer the property in question into the estate of Late Mangata Sarah Kekana, and that, should the second defendant fails and/or refuses to sign documentation required for the transfer of the property in question, to the estate of Late Mangata Sarah Kekana the sheriff of the above mentioned court which falls within the necessary Jurisdiction where the property is situated, be ordered to sign all necessary and relevant documentation, on behalf of the second respondent;*
6. *THAT the second defendant pay the costs of this action and the costs of the application under case number 56247/13 on a party and party scale, which include the costs of the urgent application and the default judgment application."*

[5] It is common cause that the late Mangata Sarah Kekana ("the deceased") was the aunt of the first applicant as well as the sister of the first respondent. The deceased was married, she and her later husband had no children of their own.

[6] The deceased left the immovable property described in the abovementioned judgment and further identified as [1...], Block F, Soshanguve. The first respondent sold the property to the third party as she believed the deceased died intestate and that she was the rightful and sole heir of the deceased. The first respondent's status is in fact confirmed in the abovementioned judgment.

[7] The first respondent was informed by her attorneys that the said immovable property was already transferred to the first applicant (on the basis that the deceased left a will nominating her). The property was transferred to the first applicant under the description of [9...] Block A, Mabopane. The respondents instituted proceedings challenging the validity of the will nominating the first applicant and transfer of the property arising thereof. It is common cause that on 15 April 2014 when the judgment was granted, the applicant's attorney was in court representing the applicants.

[8] Counsel for the applicant insisted that the rescission application is brought under Rule 42 because the judgment was granted erroneously. This is because the court failed to take into consideration that the applicant had a *bona fide* defence in that the will nominating her was a valid will and the only error was in the property description. This is despite the applicant/defendant barred to plead, and that resulting to the court without any defence before it. According to the first applicant the court could have clearly seen that the applicant was the nominated beneficiary and rectify the will. I reiterate, the applicants were legally represented.

[9] As indicated above the judgment was obtained in the presence of the applicants (defendant) because they were legally represented.

[10] Rule 42(1)(a) states:

"42 Variation and Rescission of Orders

- (1) *The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
 - (a) *An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; ..."*

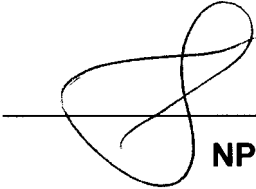
[11] According to the applicants the failure to file a plea is an error caused by her erstwhile attorney otherwise the applicants would have a *bona fide*

defence. I do not deem it necessary to deal with the aspect of existence of the *bona fide* defence as this application is brought under Rule 42. In ***Lodhi 2 Properties Investment CC v Border Developments 2007 (6) SA 87 at 95 F*** it was held that the existence or non- existence of a defence on the merits is an irrelevant consideration, and if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.

[12] Having regard to the above I find that the judgment was validly obtained. It follows that the applicant's application for the bar to file their plea to be uplifted and that they be granted condonation to file their plea must fail.

[13] In the result I make the following order

13.1 The application is dismissed with costs.



NP MALI

JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Applicants: Adv. K. Fitzroy
Instructed by: F. S. **KABINI** & ASSOCIATES

Counsel for the Respondent: Adv. M. P. Matsetela
Instructed by: JORDAAN & SMIT INC

Date of Hearing: 26 July 2016
Date reserved: 26 July 2016
Date of Judgment: 09 September 2016